LIBRARY
SUPREME COURT, U. S.

FILED
MAR 31 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

NO. 74-1235

GROVER WILLIAM SIMS, Second Lieutenant, United States Air Force, 418-66-6972FV,

Plaintiff-Appellant,

v.

CECIL E. FOX, Brigadier General, Etc., and DR. JOHN L. McLUCAS, Secretary of the Air Force,

Defendants-Appellees

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Reginald C. Wisenbaker
Bennett, Saliba & Wisenbaker
P. O. Box 1685
Valdosta, Georgia

I N D E X

	Page
TABLE OF CASES ----------	i
OPINIONS BELOW ----------	2
JURISDICTION ----------	3
QUESTION PRESENTED ----------	4
CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED -	7
STATEMENT OF THE CASE ----------	18
REASONS FOR GRANTING THE WRIT --	24
CONCLUSION ----------	31
CERTIFICATE OF SERVICE ---------	31
APPENDIX "A" ----------	33
APPENDIX "B" ----------	49
APPENDIX "C" ----------	71

TABLE OF CASES

	Page
Board of Regents v. Roth, 408 U. S. 564, 92 S Ct. 2701, 33 LED 2d 548 (1972) ----------	25
Joint Anti-Facist Refuggee Committee v. McGrath, 341 U.S. 123 -	27
Norval Goss et.al. v. Eileen Lopez et.al. ____U.S. ____, 43 Law Week 4181 ----------	25
Perry v. Sinderman, 408 U. S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 ----------	27
Peters v. Hobby, 349 U.S. 331 ---	27
United States v. Lovett, 328 U.S. 303 ----------	27
Wieman v. Updegroff, 344 U.S. 83	27
Wisconsin v. Constantineau, 400 U.S. 433 ----------	27

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

NO.

GROVER WILLIAM SIMS, Second Lieutenant, United States Air Force, 418-66-6972FV,

Plaintiff-Appellant,

v.

CECIL E. FOX, Brigadier General, Etc., and DR. JOHN L. McLUCAS, Secretary of the Air Force,

Defendants-Appellees

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, GROVER WILLIAM SIMS, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for

the Fifth Circuit entered in the above entitled case on December 30, 1974.

OPINIONS BELOW

The en banc opinion of the United States Court of Appeals for the Fifth Circuit Appendix "A", infra pp 33-48 has not yet been reported.

The opinion of the three judge panel of the United States Court of Appeals for the Fifth Circuit entered in this case, Appendix "B", infra p 49-70 is reported at 492 F. 2d 1088.

The order of the District Court filed in this case on June 9, 1973, in the United States District Court for the Middle District of Georgia, Valdosta Division, Appendix "C", pp 71-75 is not reported.

JURISDICTION

The order of the District Court for the Middle District of Georgia, Valdosta Division dismissing Plaintiff/Appellant's petition for failure to state a claim was entered on June 9, 1973, Appendix "C", infra p 71. The decision of the three Judge Panel of the United States Court of Appeals, Fifth Circuit, reversing and remanding the case was entered on April 19, 1974. Appendix "B" pp 49-70. On July 24, 1974, the United States Court of Appeals, Fifth Circuit ordered a rehearing en banc. Subsequently, on December 30, 1974, the United States Court of Appeals, Fifth Circuit, en banc, entered its judgment affirming the District Court Appendix "A", p 33-48

The jurisdiction of this court is invoked under 28 U.S.C. § 1254 (1).

QUESTION PRESENTED

In 1972, Lt Sims, a 2nd Lieutenant, in the United States Air Force, was charged with certain acts of misconduct in the Georgia State Courts. By order of the Superior Court of Lowndes County Georgia, the Lieutenant was sent to the State Mental Hospital where his problem was diagnosed as a Personality disorder, sexual deviation, exhibitionism and with Prognosis that under appropriate psychotherapy recurrence of symptoms are usually nil.

After several months of treatment he was released as cured. Subsequently, the charges in the State Court were disposed of by an entry of nolo contendre plea and a discharge without

adjudication of guilt. The Lieutenant was also examined by Air Force psychiatrist who recommended that he be retained in service. Two days later, the same doctor changed his recommendation recommending he be discharged. The Lieutenant was ordered discharged with an indication upon his discharged certificate casting reflections upon and impugning his reputation and character. Lieutenant Sims requested a hearing prior to discharge in order to refute and rebut the charges forming the basis for his discharge. Upon denial of the hearing, Lieutenant Sims filed a complaint asking the District Court to enjoin the Air Force from discharging him without a hearing. The District Court dismissed the complaint for failure to state a claim. (Appendix "C"). The

three Judge panel of the Circuit Court held Lieutenant Sims was entitled to a hearing prior to being discharged with a certificate casting reflection upon and impugning his character and reputation. (Appendix "B") The Circuit Court en banc held that Lieutenant Sims had no property right in continued military employment nor was his liberty infringed by the derogatory information forming the basis for his discharge. (Appendix "A")

The question presented is:

(1) Does a reserve officer in the United States Air Force have sufficient Liberty or property interest in his military record and career to invoke the minimum protection of the Due Process Clause of the fifth amendment of the Constitution of the United States when

the Air Force attempts to discharge him for causes which substantially impugnes his good name, character, and reputation?

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States:

> . . . nor be deprived of life, liberty, or property, without due process of law; . . .

> 10 USC § 1163 (a) An officer of a reserve component who has at least three years of service as a commissioned officer may not be separated from that component without his consent except under an approved recommendation of a board of officers convened by an authority designated by the Secretary concerned, or by the approved sentence of a court-martial. This subsection does not apply to a separation under subsection (b) of this section or under section 1003 of this title, to a dismissal under section 1161 (a) of this title, or to a transfer under section 3352 or 8352.

. . .

10 USC § 1162 (a) Subject to other provisions of this title, reserve commissioned officers may be discharged at the pleasure of the President. Other Reserves may be discharged under regulations prescribed by the Secretary concerned.

. . .

10 USC § 8447

. . .

(c) The President may vacate at any time a temporary appointment in a commissioned grade. Aug. 10, 1956, c. 1041, 70A Stat. 523; Sept. 2, 1958, Pub.L.85-861, § 1 (180) (D), 72 Stat. 1532.

Air Force Regulation 35.6 ¶ 4-5, Reaccomplishment of DD Form 214, effective 1 May 1974.

A current or former member of the USAF may request reaccomplishment of his DD Form 214 either in writing or in person from the CBPO nearest his location. The member must furnish the original DD Form 214 that he desires be reaccomplished. Upon receipt of written or personal request the CBPO-DPMMR will:

(a) Change by masking out the member's original DD Form 214 the "reason and authority" item and "reenlistment eligibility code" item. These items should be filed with a dashed line. Extreme care must be taken in order not to deface the member's original DD Form 214. The DD Form 214 will then be permanently reproduced on white paper in two copies. After reproduction both copies will then be authenticated by use of the official stamp maintained or supplied by the local special orders authenticating agency. Furnish one copy to the custodian of the member's Master Personnel Records as indicated in AFM 35-14. Return original copy of DD Form 214 to member.

(b) If the member insists, then reaccomplish the DD Form 214 in two copies. All information shown on the original DD Form 214 will be transcribed to the reaccomplished form with the exception of "Reason and authority for separation" and "Reenlistment Eligibility Code." These items will be left blank on the reaccomplished form and dash marks will be entered. After reaccomplishment, both copies will be authenticated by use of the official stamp maintained or supplied by the local special orders authenticating agency. Return

member's original copy of DD Form 214 to him for his personal file. Furnish the original of the reaccomplished form to the member and forward the second copy to the custodian of the member's Master Personnel Records as indicated in AFM 35-14. [The reaccomplished DD Form 214 will be signed by an individual authorized to sign DD Forms 214 (table 2, item 31.)]

Air Force Regulation 35-6 ¶ 4-2, DD Form 214, Report of Separation from Active Duty.

(a) Preparation:

(1) The DD Form 214 is an important record of service. It should be carefully prepared to assure accuracy and completeness. Corrections and changes during preparation are to be avoided, but where necessary should be neat and legible and initialed on all copies by the authenticating officer. Once the original has been delivered to the individual, no corrections may be made to copies by the separating activity. The recipient will be informed that making any change or alteration of DD Form 214 is prohibited.

(2) The form is destined for use within the civilian community

where there is not a broad familiarity with military abbreviations. Accordingly, abbreviations should be used sparingly. Additionally, care should be exercised to insure that copies of DD Form 214 transmitted for the information of various government agencies are clearly legible.

(3) The authority for a member's transfer or discharge will be cited by reference to the appropriate regulation, instructions, or manual, followed by the appropriate separation designation number (SDN), or separation program designator (SPD). (See table 2, note 5.)

(4) Incomplete items will contain the remark "see item 27" (c below). If an item does not apply enter "NA". All entries, exclusive of signature, will be typewritten. If more space is needed, continue the items in item 27 or, if necessary, on the reverse of the form. Complete all items on the face of the form first if possible, so that carbons will need to be moved but once.

(5) Except for members in (8) below, use DD Form 124 (8 part). Except for member in (6) and (7) below, attachment 2 reflects the authorized entries for each item of DD Form 214 for members

of the Regular Air Force.

(6) Authorized entries for members of the Reserve components serving under the Non prior Service Enlistment Program are shown in attachment 6.

(7) Authorized entries for members of the Reserve components serving on active duty for training for a period of 90 days or more are shown in attachment 7.

(8) For members separated to continue in service (that is, reenlistment, acceptance of Regular appointment, or discharge from enlisted status to accept commissioned grade), use DD Form 214 (3 part).

b. Records Used. DD Form 214ws, Worksheet for Report of Separation from Active Duty will be used to prepare date for entry on the DD Form 214. It will be completed from information contained in the member's FRGP and personnel data system (PDS) products such as Uniform Officer Record (UOR), or Uniform Airman Record (UAR) soft copy, or Uniform Military Personnel Record (UMPR). Extreme care will be taken to insure the accuracy of all data. When data in the PDS is found to be incorrect, immediate action must be taken to attempt correction before records close out.

c. When Records Are Not Available. When the DD Form 214 cannot be completed due to loss, damage, or delay in receipt of the FRGp, every effort will be made to obtain the records from the member's last servicing CBPO or by application to AFMPC/DPMDR, Randolph AFB TX 78148. However, in no case will the separation of a member be delayed because of the absence of information required to complete the DD Form 214 in detail. In such cases, the DD Form 214 will be accomplished to the extent possible, making full use of PDS products available, and reason for incompleteness noted in item 27.

d. Distribution. Distribution instructions are contained in paragraph 3-2 and attachments 5, 6, and 7. For members separated to continue in service, distribute according to (1) through (3) below:

(1) Original. Present to the member.

(2) Duplicate. Forward to AFMPC/DPMDRR, Randolph AFB, TX 78148.

(3) Triplicate. Forward to the appropriate director of Selective Service for the address in item 8b (or item 8c if item 8b is blank).

e. Correcting DD Form 214. DD Form 215, Correction to DD Form 214, Report of Separation from Active Duty, will be used to correct errors in DD Form 214 discovered after the original has been delivered and/or distribution of copies of the form has been made. Except as specified in attachment 3 no field installation is authorized to issue a DD Form 215. If correction of DD Form 214 is necessary after the member's actual departure from the installation that separated him, see attachment 3 for the agency responsible for making the necessary changes. The distribution of DD Forms 214 and 215 will be identical.

Air Force Regulation 36-2 4 d(4), Recommendation for Action is Appropriate:

A recommendation for action under this regulation is appropriate when any of the circumstances outlined in this paragraph, or similar circumstances, exist. The records listed in AFR 36-3 as warranting recommendation for initiation of action under that regulation for substandard performance of duty may not be used in conjunction with the reasons listed in this paragraph as the basis for initiation of action under this regulation. However, evidence of unfitness or unacceptable conduct which is not considered serious enough to warrant action

or separation under this regulation may be used to support the reasons for initiation of action under AFR 36-3, if the misconduct or unfitness did in fact contribute to the officer's substandard performance of duty. A nonprobationary Regular commissioned officer or a probationary Regular commissioned officer with extensive service who is discharged for any of the reasons stated in a through e below, or similar reasons, will be considered to have been discharged because of moral or professional dereliction. . .

. . .

d. Sexual Perversion. This includes but is not limited to: . . .

(4) Indecent exposure.

. . .

Air Force Regulation 36-12, ¶ 37, Discharge as a Result of Board Action:

AFR's 35-62, and 36-3 establish procedures for the separation of officers who fail to meet the standards of conduct and performance prescribed by the Secretary of the Air Force. When the Secretary of the Air Force, based on the approved recommendations of a board of officers, directs that an officer be discharged for any

> of the reasons outlined in those regulations, discharge will be accomplished under this paragraph. The character of discharge will be as determined by the Secretary of the Air Force in accordance with paragraph 5 of this regulation and any other applicable criteria contained in the regulation under which action was initiated. (SDN 590 if initial action was under AFR 35-62; SDN 587, homosexual; SDN 588 if action initiated under AFR 36-2 for other reasons; SDN 589 if action initiated under AFR 36-3).

Ga. Laws 1958, pp. 324-326. Probation for first offenders, when applicable; violation of terms of probation:

> Section 1. Upon a verdict or plea of guilty or a plea of nolo contendere but before an adjudication of guilt, the court may, in the case of a defendant who has not been previously convicted of a felony, without entering a judgment of guilt and with the consent of the defendant, defer further proceeding and place the defendant on probation as provided by the Statewide Probation Act (Ga. L. 1956, p. 27). Upon violation of the terms of probation, or upon conviction for another crime, the court may enter an adjudication of guilt and

proceed as otherwise provided. No person may avail himself of the provisions of this Act on more than one occasion.

Section 2. Upon fulfillment of the terms of probation, or upon release by the court prior to the termination of the period thereof, the defendant shall be discharged without court adjudication of guilt. Such discharge shall completely exonerate the defendant of any criminal purpose, shall not affect any civil right or liberties, and he shall not be considered to have a criminal conviction. Should a person be placed under probation under this Act, a record of the same shall be forwarded to the office of the State Probation System and to the Identification Division of the Federal Bureau of Investigation.

Section 3. The probationer shall be informed of the terms of this Act at the time of imposition of sentence.

Section 4. If otherwise allowable by law in any subsequent prosecution of the defendant for any other offense, such prior finding of guilt may be pleaded and proven as if an adjudication of guilt had been entered and relief had not been granted pursuant to this Act.

Section 5. A defendant sentenced pursuant to this Act shall have the right to appeal in the same manner and with the same scope and same effect as if judgment of conviction had been entered and appealed from.

Section 6. This Act shall be effective as to all crimes committed after the date of its approval.

Section 7. All laws and parts of laws in conflict with this Act are hereby repealed.

STATEMENT OF THE CASE

This case originated with petitioner filing a complaint for injunction and equitable relief in the United States District Court in the Middle District of Georgia, Valdosta Division. The jurisdiction of that Court was invoked under Article III, Section 2, of the Constitution of the United States and 28 USC § 1331-A.

Petitioner alleged in his complaint

that the Air Force was proceeding to discharge him under 10 U.S.C. § 1162 and 8447 and Air Force Regulations § 36-2 p. 14, supra. Pursuant to orders from Randolph Air Force Base dated 14 May, 1973, petitioner was to be discharged within ten days and his discharge certificate was to indicate the reasons for discharge as SDN 588 ¶37 AFR 36-12 (supra. p. 15). Such a discharge in simple terms carries on its face a statement that the officer concerned was discharged under Air Force Regulations 36-2 dealing only with "unfitness, unacceptable conduct or in the interest of national security."

The grounds for instituting the discharge proceedings against petitioner arose out of certain criminal charges against petitioner in the Criminal Courts

of Georgia. In the criminal proceeding the petitioner, after extensive psychiatric examination,treatment, and rehabilitation entered a plea of nolo contendre under the Georgia First Offender Act (p. 16, supra.), was placed on probation on January 4, 1973. Pursuant to provisions of the act, on March 22, 1973 petitioner was discharged without any adjudication of guilt and complete exoneration of all criminal purpose.

Upon receiving notice of the order of discharge petitioner filed his complaint in District Court asking for an opportunity to appear in person before the decision making Board in order to refute the charges which formed the basis for his discharge and to offer evidence in rebuttal to these charges and offer

evidence as to his fitness for continued military service.

The District Court entered an ex parte temporary restraining order to maintain the status quo until the issues were resolved. The Air Force by and through the U.S. Attorney for the Middle District of Georgia filed a motion to dissolve the temporary restraining order and to dismiss the complaint. The District Court, after consideration of briefs submitted by plaintiff and defendant, issued its memorandum and order (app. "C" p. 71) dismissing plaintiff's complaint.

Forthwith plaintiff filed his notice of Appeal to United States Circuit Court of Appeals for the Fifth Circuit. A three Judge panel of the Fifth Circuit reversed the District Court app. "B"

pp 49-70 . Upon granting of a motion for rehearing en banc, the full court affirmed the District Court with six of the fifteen Judges dissenting app. "A" pp 33-48 .

During the interim between issuance of the panel decision and the oral arguments before the Fifth Circuit en banc the Air Force modified its regulations in regard to the placement of SDN number on the certificate of discharge (DD Form 214). In lieu of entry of "SDN 588 par. 37 AFR 36-12", p. 15, supra, which would have been entered in the space entitled "Reason for Discharge" on the original and all copies of DD Form 214 under the old regulations, the new regulations (AFR 35-6 ¶4-5 supra p. 8) provide the original DD Form 214 will have three dash marks (---) while the

copies of this form retained in his permanent records will contain the same disparaging information as provided under the former regulations.

In substance petitioner has been ordered discharged from the United States Air Force, not simply under the statutes and regulation of the United States Conferring upon the President power and authority to discharge probationary Reserve Officer, but rather under Statutes and regulations providing authority for discharge of officers for unfitness and unacceptable conduct. Petitioner has and does fervently contend that under these circumstances the due process clause of the fifth amendment to the Constitution of the United States requires that he have a hearing to refute the charges and offer evidence in

rebuttal to the charges forming the basis of this action of the Air Force which deprives petitioner of a substantial property and liberty interest. The effect of the Judgment of the Circuit Court upon petitioner is to deprive him of his career in the Air Force, all rights as a reserve officer and to limit him in his ability to acquire civilian employment in addition to having his military records (which constitute a significant property as well as liberty interest in itself) containing information impugning his character and fitness for service all without ever affording the petitioner of an opportunity to be heard on the matter.

REASONS FOR GRANTING THE WRIT

The decision below directly conflicts with the due process principle enunciated

in this Court's rulings in Norval Goss et.al. v. Eileen Lopez et.al. ____U.S. ____, 43 Law Week 4181. In the Goss Case this Court held that high school students suspended from school for periods of ten days was entitled to the protection of the due process clause when the basis of this suspension was misconduct on the part of the student.

The decision below is in direct conflict with the principles of due process enunciated by this Court in Board of Regents v. Roth, 408 U. S. 564, 92 S Ct. 2701, 33 LED 2d 548 (1972). In the Roth case this court held that the due process clause affords protection to both liberty and property interest; and when a protected interest is implicated, the right to some kind of prior hearing is Paramount. To assert that the

petitioner had no property interest in his military career one must totally disregard all the facts in the record as well as his common knowledge of the operation of the Air Force and other branches of service. Petitioner had the prospect of enjoying his full tour of duty as a flying officer in the Air Force with the possibility of transferring to the regular service upon completion of his tour of active duty. If he had not transferred to the regular status he would have returned to non-active reserve duty with definite material benefits. Likewise, petitioner's military record per se is a valuable asset to a member of the armed services upon his return to civilian status and when the accuracy of the entries made therein is challenged the

minimal safe guards of due process come into play. Furthermore, as conceded by the Court below petitioner has a protected liberty interest and as this Court stated in the Roth case "where a person's good name, reputation, honor and integrity is at stake because of what the government is doing to him, notice and opportunity to be heard are essential." Citing Wisconsin v. Constantineau, 400 U.S. 433; Wieman v. Updegroff 344 U.S. 83; Joint Anti-Facist Refugee Committee v. McGrath, 341 U.S. 123; United States v. Lovett, 328 U.S. 303; Peters v. Hobby, 349 U.S. 331.

The decision in the District Court is in direct conflict with the principles enunciated by this Court in Perry v. Sinderman, 408 U.S. 593, 92 S. Ct.

2694, 33 L.Ed. 2d 570. In Perry this court held that a college professor employed by university without any written contractual tenure provisions have a "property" interest in continued employment based upon "implied" contract, circumstance of his service, or other relevant facts and the state could not deprive him of these rights without the minimal safeguard of procedural due process.

The principle in the Perry Case is particularly applicable in the Case at bar. Under the statutes applicable ie. 10 USC 1162, a reserve officer can be discharged at the pleasure of the President. This is essentially the situation that existed in the Perry Case where the professor had no contractual right to Continued Employment. Nevertheless,

he had a property interest under an "Implied Contract" theory. Likewise, Lt. Sims, although a reserve officer who served at the pleasure of the President under all the circumstances could expect to serve a full tour of duty (barring any general reduction in force), and then be entitled to the benefits of a Reserve Officer; and as such was entitled to a hearing before being discharged under regulations casting reflections upon and greatly impugning his character.

If the Judgment below is allowed to stand the petitioner will have to live the rest of his life with a military record containing the disparaging immoral conduct as the grounds for discharge without ever affording him the opportunity to challenge the validity

of these grounds or to offer evidence of exoneration or mitigation of the charges. The practical effect of this is to deprive him of this opportunity to participate in a lucrative profession in the United States either on a part-time or a full time basis. Likewise, his discharge constitutes a blemished passport back to civilian which will bar the petitioner from ever utilizing his service record in seeking civilian employment because of the action of the Air Force in arbitrarily contaminating his record unjustly.

CONCLUSION

For these reasons this Court should issue the Writ to review the decision of United States Court of Appeals for the Fifth Circuit.

Reginald C. Wisenbaker
Bennett, Saliba & Wisenbaker
P. O. Box 1685
Valdosta, Georgia

CERTIFICATE OF SERVICE

This is to certify that I have this day served true and correct copies of the foregoing Petition for Writ of Certiorari to the Supreme Court of the State of Georgia, by mail, by depositing the same in a United States mail box, with first class postage prepaid.

addressed to each of the following, who constitute all counsel of record:

Thomas G. Wilson, Esquire
Appellate Section, Civil Division
United States Dept. of Justice
Washington, D. C. 20530

This _____ day of March, 1975.

All parties required to be served have been served.

_____

Reginald C. Wisenbaker

Grover William SIMS, Second Lieutenant, United States Air Force, 418-66-6972FV, Plaintiff-Appellant,

v.

Cecil E. FOX, Brigadier General, Etc., and Dr. John L. McLucas, Secretary of the Air Force, Defendants-Appellees.

No. 73-2707.

United States Court of Appeals, Fifth Circuit.

April 19, 1974.

Air force officer brought action to have his discharge enjoined on grounds that he was entitled to have a hearing with minimal due process procedures before he could be subjected to unfavorable action against him. The United States District Court for the Middle District of Georgia, at Valdosta, J. Robert Elliott, Chief Judge, dismissed the complaint, and plaintiff appealed. The Court of Appeals, Tuttle, Circuit Judge, held that officer could not be legally separated from Air Force by giving him a discharge which, though characterized as "honorable," carried with it a separation designation number that signified a discharge on ground of unfitness and/or unsuitability, without affording officer a hearing at which he could personally be present and present evidence, and that failure of officer to pursue administrative remedies under statutes providing for correction of military records and for review of discharges and dismissals did not preclude officer from maintaining such action.

Reversed and remanded with directions.

Synopsis, Syllabi and Key Number Classification COPYRIGHT © 1974, by WEST PUBLISHING CO.

The Synopsis, Syllabi and Key Number Classification constitute no part of the opinion of the court.

INDEXED

1. Armed Services ⇐11

Air force officer, who had been charged in state courts with several misdemeanors involving indecent exposure, could not be legally separated from Air Force by giving him a discharge which, though characterized as "honorable," carried with it a separation designation number that signified a discharge on ground of unfitness and/or unsuitability, without affording officer a hearing at which he could personally be present and present evidence, including witnesses, on his behalf, and at which he could make at least an effort to stave off the impending threat to his future reputation and security.

2. Armed Services ⇐11

Statutes providing for correction of military records and for review of discharges and dismissals were enacted initially for purpose of avoiding a large number of "private" bills in Congress by which formerly discharged service men sought to have nature or character or type of discharge certificate corrected because of real or imaginary defects in the military system which they felt had prejudiced them. 10 U.S.C.A. §§ 1552, 1553.

3. Armed Services ⇐11

Failure of air force officer to pursue administrative remedies under statutes providing for correction of military records and for review of discharges and dismissals did not preclude officer from maintaining action based on claim that he could not be discharged on grounds that he was "unfit" or "unsuitable" and ineligible for recall, and also be deprived of his reserve commission without minimal procedural due process. 10 U.S.C.A. §§ 1552, 1553.

Appeal from the United States District Court for the Middle District of Georgia.

Before TUTTLE, BELL and GOLDBERG, Circuit Judges.

TUTTLE, Circuit Judge:

This appeal raises the question whether the United States Air Force can legally separate a reserve officer *for cause* by giving him an "honorable" discharge which, however, carries with it a "separation designation number 588" signifying a discharge on the ground of "unfitness and/or unsuitability," without affording such officer an opportunity for a hearing. What is not before the Court is the right of the Air Force to relieve a reserve officer from active duty with an unqualified honorable discharge certificate as a part of a reduction in force without a hearing. Lt. Sims contends that he cannot be discharged on the grounds that he is "unfit" or "unsuitable" and ineligible for recall, and also be deprived of his reserve commission as an Air Force officer without minimum procedural due process.

The facts may be briefly stated. The plaintiff whose military career had been entirely satisfactory was charged in the Georgia Criminal Courts with several misdemeanors involving indecent exposure. By order of the State Superior Court judge he was sent to the Central State Hospital at Milledgeville, Georgia, where he remained for several months for a period of extensive psychiatric care and treatment. Thereafter, on March 22, 1973, the Georgia Superior Court judge signed an order discharging Sims without any adjudication of guilt as to all charges pending against him, which said order completely exonerated him of any criminal purpose.[1]

1. This procedure is authorized by sections 27-2727 to 27-2732 Ga.Code Ann. The provisions of this statute are as follows:

Section 1

"Upon a verdict or plea of guilty or a plea of nolo contendere [but] before an adjudication of guilt, the court may, in the case of a defendant who has not been previously convicted of a felony, without entering a judgment of guilt and with the consent of the defendant, defer further proceeding and place the defendant on probation as provided by the Statewide Probation Act (Georgia laws 1956 p. 27). Upon violation of the terms of probation, or upon a conviction for another crime, the court may enter an adjudication of guilt and proceed as otherwise provided. No

In the meantime, on January 24, 1973, Sims was notified in writing of the initiation of administrative discharge proceedings under Air Force Regulations 36–2 by the Commander of his wing at the Moody Air Force Base in Georgia. Air Force Regulations 36–2 are entitled "Administrative Discharge Procedures" and the subhead reads "This regulation establishes criteria for identifying officers of the Air Force serving in the active military service who, because of evidence of unfitness or unacceptable conduct, should be required to show cause for retention in the Air Force. It also prescribes procedures for the disposition of cases involving such officers and those cases approved under Air Force Regulations 35–62, Military Personnel Security Program, for further processing under this Regulation." The January, 1973 notice stated: "I am initiating action against you under AFR 36–2 for the reasons outlined in ¶ 4D(4) of that Regulation." Paragraph (4) deals with the subject matter that may properly subject an officer to an inquiry under Regulations 36–2. Subparagraph D(4) is entitled "Sexual Perversion" and reads: "This includes but is not limited to: . . . (4) indecent exposure."

Plaintiff was advised that he could submit written statements within fifteen days and there was attached to the letter an extract of a report of an investigation that had been made by the appropriate Air Force officers. Sims responded on February 7th and stated "I do not desire to comment on the allegations contained in paragraph 2 to the attached letter."

person may avail himself of the provisions of this [Act] on more than one occasion."
Section 2
"Upon fulfillment of the terms of probation, or upon release by the court prior to the termination of the period thereof, the defendant shall be discharged without court adjudication of guilt. Such discharge shall completely exonerate the defendant of any criminal purpose, shall not affect any civil right or liberties, and he shall not be considered to have a criminal conviction. Should a person be placed under probation under this [act], a record of the same shall be forwarded to the office of the State Probation System and to the Identification Division of the Federal Bureau of Investigation."

Paragraph 2 contained the allegations as to the indecent exposure already discussed above. Thereafter on February 27, 1973, the Commander Air Training Command recommended to Headquarters U.S. Air Force that plaintiff be given an honorable discharge from all appointments in the United States Air Force. Under the regulations, since Sims was a probationary reserve officer he was not entitled to a hearing before obtaining a discharge as a matter of right. The Commander recommended processing under section E, Air Force Regulations 36–2, which provides for the Secretary of the Air Force, Personnel Board, to review all the documentary evidence, including that submitted by the officer, but without the appearance of the officer or his representation by counsel unless such appearance is determined by the Board to be necessary.

On March 26, 1973, Lt. Sims submitted to the Commander of his wing for forwarding to the Air Training Command a letter expressing his desire to remain in the Air Force and he accompanied this letter with a favorable letter of evaluation relating to his duty performance as well as a report of his psychiatric evaluation at Central State Hospital which contained a statement "The prognosis in this type of disorder with the appropriate treatment, which is primarily psychotherapy, is fairly good, and chances for recurrence of the symptoms are usually nil." Sims also forwarded a copy of the order of the Superior Court discharging him from the state criminal proceedings.

Following the ex parte consideration of Sims' file proper Air Force authorities notified his Commanding Officer at Moody Air Force Base to have him discharged, and such discharge was to be accomplished in the following manner: "Show in orders and item 11(c), DD Form 214 [the discharge certificate] reason and authority: SDN 588, ¶ 37, AFR 36–12 and this message." The discharge was to be accomplished within ten days. Prior to the expiration of this date Lt. Sims filed his suit in the district court, seeking to have the dis-

charge enjoined on the grounds that he was entitled to have a hearing with minimal due process procedures before he could be subjected to this unfavorable action against him. The trial court initially granted a temporary restraining order to stay the discharge long enough for it to consider the Government's motion to dismiss. After the hearing the court entered an order dismissing the complaint on the ground that no due process requirements would attach to the ordering of an "honorable" discharge. The court granted a stay to afford Sims an opportunity to appeal. Following the filing of an appeal this Court extended the stay but ordered the appeal expedited. Unfortunately, following oral argument we found it necessary to have supplied excerpts from the relevant Air Force Regulations, and further briefing on the question of exhaustion of administrative remedies.

The real crux of this case is pointed up by the statements by the United States calling attention to the fact that the Secretary of the Air Force may give an "honorable discharge" to any member of the Air Force without a hearing. The position of the defendant is that there are many kinds of "honorable discharges" and this particular discharge certificate which the Air Force has ordered given to Sims carries on its face evidence of serious professional or moral misconduct such as would seriously affect his reputation and opportunity for success in civil life. For a young man twenty-three years of age trained as an aircraft pilot, the result may be devastating.

It is clear that the notations which are required to be placed on Sims' Form 214 (the discharge certificate) even though it is termed an "honorable discharge" make it perfectly plain that he will have been discharged as a result of Board action which had been undertaken because of his "unfitness, unacceptable conduct, or in the interest of national security." This follows from the fact that the instructions for his discharge directed that the discharge certificate contain an entry at the appropriate place giving "reason and authority SDN 588 ¶ 37 AFR

36–12." Paragraph 37 of Regulation 36–12 deals only with separation as a "result of Board action" as to officers "who fail to meet the standards of conduct and performance prescribed by the Secretary of the Air Force." It further provides that the designation SDN 588 would identify "action initiated under AFR 36–2" on any of the grounds of unfitness or unacceptable conduct described in that regulation other than of homosexuality which was assigned SDN 587. In other words, any certificate of discharge bearing the designation SDN 588 carries on its face a statement that the officer concerned had been discharged under Air Force Regulation 36–2 dealing only with "unfitness, unacceptable conduct or in the interest of national security." Moreover, as was readily conceded during oral argument, such a discharge would make such officer ineligible for recall to active duty. Furthermore, the order to discharge Sims "from all appointments in the United States Air Force" means, as we understand it, cancelling his commission in the Air Force Reserve.

Simply stated, an honest inquiry into the basis for Sims' discharge would demonstrate that he had been given a discharge for reasons that would greatly undercut the status of the discharge as "an honorable discharge." The question we are to face therefore is whether a lieutenant in the Air Force can not only have his normal period of active duty terminated for cause, and be deprived of his Reserve Commission, but also have his future jeopardized by having to carry as his certificate of release from the service a document which impugns his character or reputation without having at least an opportunity to make an oral presentation and witnesses on his behalf at some kind of proceeding beyond that authorized under prevailing regulations. We of course are not considering, as we have no right to, what the Air Force Board of Officers, under a proper regulation, should, or would, be likely to do if Lt. Sims had been afforded a hearing in the true sense of the word. We have cited some favorable aspects of his case above merely to show that his contention that he ought to have an

opportunity to appear in person to argue his case either personally or by counsel is not an empty gesture on his part.

The most important matter that Sims would normally wish to present to an administrative tribunal would, of course, be the disposition of his criminal case in the Georgia courts, and also the evaluation of his performance of military duties (which was certified by his commanding officer to be unexceptionable), and the prognosis as to his psychological problem made by the Georgia Central State Hospital.

There can be no doubt but that Sims' discharge is a flawed passport back to civil life. The detriment he will suffer is of sufficient magnitude to create a genuine issue as to whether the Air Force should not be required to provide him with a hearing at which he could personally be present and make at least an effort to stave off the impending threat to his future reputation and security. As the Supreme Court said in Green v. United States, 365 U.S. 301, 304, 81 S.Ct. 653, 655, 5 L.Ed.2d 670 (1961), when speaking of the need for granting an individual accused in a criminal case the absolute right to speak for himself: "The most persuasive counsel may not be able to speak for a defendant as the defendant might, with halting eloquence, speak for himself." The value to a person facing a loss of a substantial right to speak for himself where no counsel was permitted to speak for him is of course even greater.

Moreover, Lt. Sims had a prospect of enjoying his full tour of duty as a flying officer in the Air Force, subject only to normal procedures that might fortuitously make it necessary for his active duty to be terminated earlier. Here, he was deprived of that expectation of continued service, see McDowell v. State of Texas, 465 F.2d 1342 (5th Cir. 1971) because of alleged misconduct.

Besides, he was to be deprived of his status as a reserve officer, which carries with it intrinsically valuable emoluments

for service as a "week-end warrior" if he remained in certain reserve categories.

We do not doubt that such a right as Sims possessed is sufficiently similar to those rights which the courts have held cannot be taken away without procedural due process as to give validity to his contention here. *See* McDowell v. State of Texas, *supra*; Hagopian v. Knowlton, 470 F.2d 201 (2d Cir. 1972); Perry v. Sindermann, 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972). For all that appears in this record he would have continued to serve as an Air Force officer on flying status for a period (which, however, is not made plain in the record before us) but for the action taken because of his acts of indecent exposure which triggered the proceedings commenced against him by the letter of January 24, 1973.[2]

Even if this termination for cause of his Air Force status were not in itself the deprivation of a right entitling him to procedural due process, his discharge in a manner that marked him as unfit to serve was of itself the deprivation of a protected right. Such a right was described by the Supreme Court in Board of Regents v. Roth, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972). In *Roth* the Court held that a failure to rehire a non-tenured teacher was permissible because nothing damaging to Roth's reputation could be inferred from the state's action. The Court said:

> "In declining to rehire the respondent, [the state] did not make any charge against him that might seriously damage his standing and associations in his community. It did not

2. This letter commenced by saying "I am initiating action against you under AFR 36-2 for the reasons outlined in paragraph 4D(4) of that regulation." Paragraph 4D(4) states as follows:

> "(4) When recommendation for action is appropriate. A recommendation for action under this regulation is appropriate when any of the circumstances outlined in this paragraph or similar circumstances exist . . ."
>
> "(d) Sexual perversion. This includes but is not limited to:
>
> . . . . . .
>
> "[4] Indecent exposure. . . ."

base the nonrenewal of his contract on a charge, for example, that he had been guilty of dishonesty, or immorality. Had it done so, this would be a different case for 'where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential.' Wisconsin v. Constantineau, 400 U.S. 433, 437 [, 91 S.Ct. 507, 27 L.Ed.2d 515] (1971); Wieman v. Updegraff, 344 U.S. 183, 191 [, 73 S.Ct. 215, 219, 97 L.Ed. 216] (1952); Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123 [, 71 S.Ct. 624, 95 L.Ed. 817] (1951); United States v. Lovett, 328 U.S. 303, 316–317 [, 66 S.Ct. 1073, 1079, 90 L.Ed. 1252] (1946); Peters v. Hobby, 349 U.S. 331, 352 [, 75 S.Ct. 790, 801, 99 L.Ed. 1129] (1955) (Douglas, J., concurring). See Cafeteria & Restaurant Workers v. McElroy, 367 U.S. 886, 898 [, 81 S.Ct. 1743, 1750, 6 L.Ed.2d 1230] (1961). In such a case, due process would accord an opportunity to refute the charge before University officials [footnote not included]. In the present case, however, there is no suggestion whatever that the respondent's 'good name, reputation, honor, or integrity' is at stake." 408 U.S. 564, 573, 92 S.Ct. 2701, 2707.

Here, of course, there is precisely the ingredient which was lacking in *Roth*. The Air Force seeks to discharge Lt. Sims in a manner that denigrates his reputation, honor or integrity because of the nature of the entries on the discharge certificate.

A somewhat similar case was decided by the Court of Appeals for the Second Circuit when it concluded that the Court could intervene in a threatened expulsion of a cadet at the United States Military Academy and his return to active duty status where the cadet was denied a due process hearing.

The case of Hagopian v. Knowlton, 470 F.2d 201 (2d Cir. 1972), dealt with action of the United States Military Academy "separating" a third year cadet for deficiency in conduct after receiving 107 demerits as of a certain date, 5 demerits in excess of the 102 demerit allowance prescribed as a maximum

for the period involved. The order of separation would also subject cadet Hagopian to transfer to active duty in the armed services. The cadet challenged the failure of the academy officials to comport with the minimum due process requirements in the procedures by which the demerits were charged against him, since when these demerits accumulated to the number of 102 this would warrant the termination of his cadetship by the academy's academic board. The court held:

> "We hold that the existing measures presently available to a cadet for contesting an *individual award of demerits* are sufficient to meet minimum standards of due process, but that when an *accumulation of awarded demerits* renders the cadet subject to separation, he must be granted a fair hearing before being separated, including the right to personally appear and to present witnesses and other evidence in his behalf."

In a carefully considered opinion the court recognized the basic precept that:

> "Such important matters, [the provision of rigorous and exacting standards of discipline and behavior and personal decorum for cadets] which are a part of the Army's conduct of military affairs and the standards adopted by it to prepare men for military operations, should not be interfered with by the judiciary." Citing Orloff v. Willoughby, 345 U.S. 83, 73 S.Ct. 534, 97 L.Ed. 842 (1953).

As is pointed out in the opinion, the court noted that the academic board had a double function. It was first to determine whether the cadet in question had accumulated an excessive amount of validly awarded demerits over the course of the demerit period. Then, if so, it must then determine whether the cadet's "potential warrants retention," so as to allow probation rather than separation. In other words the board had a responsibility of doing more than totalling the number of demerits and then exacting the maximum penalty

of dismissal from the academy if they equalled more than 102. The board was charged with the requirement of determining whether the cadet's character, qualifications and other "potential" warranted his retention as a cadet. Here, too, the hierarchy of the Air Force was required to consider the record of Lt. Sims and make a recommendation to the "character" as well as the "type" of discharge. Moreover, it is undisputed that the board could have rejected the initial recommendation of Sims' commanding officer that he be discharged from his commission. Such a judgment would necessarily be on much the same standards as that spoken of in *Hagopian*, i. e. whether Lt. Sims "potential warrants retention" notwithstanding the truth as to the original charges brought against him. Relevant to this judgment would be the factors already mentioned as to the disposition of his case in the state criminal court, the certification as to the outstanding performance of his duties by his superior officer, and the prognosis as to a possible recurrence of his psychiatric problem. As the court in the Second Circuit said:

> "Perhaps more importantly, with respect to certain of the demerit awards and *especially with respect to the subjective evaluation of the cadet's potential, the opportunity to personally appear and present his case may affect considerably the credibility which the members of the Academic Board attach to the cadet's appeal.*"

We read the word "credibility," to cover more than credibility as to the truth or falsity of the original charges.

The court further said:

> "The opportunity to bring witnesses to appear in his behalf may also strengthen the impact of his case above the frail impression which a written submission would make." 470 F.2d 201, 211.

We conclude as did the court in *Hagopian* and the earlier case of Wasson v. Trowbridge, 382 F.2d 807 (2d Cir. 1967), (a

case dealing with the dismissal of a third year student at the Merchant Marine Academy) that at such a hearing:

> "The [officer] must be allowed to appear and present evidence, including witnesses, on his behalf. The importance of informality in the proceeding militates against a requirement that the cadet be accorded the right to representation by counsel before the Academic Board."

We think the case of Pauls v. Secretary of Air Force, 457 F.2d 294 (1st Cir. 1972), in no way conflicts with what we decide here. In that case the particular officers involved had their active service terminated among a group involved in a reduction in force. They were not selected to appear before a board to answer charges of misconduct for the purpose of determining whether they were to be retained in the service.

[2] Finally, the appellees contend that the trial court did not have jurisdiction of this matter because of the failure of Lt. Sims to pursue available administrative remedies. In its brief filed in this Court the government's position is far from clear. It states:

> "Plaintiff has not exhausted his administrative remedies. He has further administrative appeals under 10 U.S.C. § 1552 (32 CFR 865A) and 10 U.S.C. § 1553 (32 CFR 865B)."

It is apparent that neither of these forms of administrative hearings would be available to Lt. Sims until after his discharge had been completed and his separation both as an active and as a reserve officer had become final. The sections were both enacted initially for the purpose of avoiding a large number of "private" bills in Congress by which formerly discharged service men sought to have the nature or character or type of discharge certificate corrected because of real or imaginary defects in the military system which they felt had prejudiced them. Both sections are rather broad in their language, but, upon request of the court, government counsel undertook to make plain what it contended with respect to the failure of Lt. Sims to pursue his administrative remedies.

Counsel conceded that the discharge review board, established pursuant to 10 U.S.C. § 1553 "is not authorized to grant the administrative relief the court apparently is inquiring into." The government on the other hand contended that the Board for Correction of Military Records established under the authority of 10 U.S.C. § 1552 would permit the Secretary of the Air Force to reinstate Lt. Sims if the Board or the Secretary concluded that he had been improperly discharged.

As we understand it, this amounts to the contention that Sims should accept his discharge containing the final determination by the Air Force Personnel Board that he was unfit to retain his active duty or reserve status in the Air Force and ineligible for recall and thereafter make application to the Board for Correction of Military Records seeking a reinstatement which, if recommended, could be effected only by a discretionary act by the Secretary of the Air Force.

While not called to our attention in the government's brief, this argument is most strongly supported by these earlier decisions by this Court: McCurdy v. Zuckert, 1966, 359 F.2d 491, cert. den. sub nom. McCurdy v. Brown, 1966, 385 U.S. 903, 87 S.Ct. 212, 17 L.Ed.2d 133; Tuggle v. Brown, 362 F.2d 801, cert. den., 1966, 385 U.S. 941, 87 S.Ct. 311, 17 L.Ed.2d 220; and Stanford v. United States, 1969, 413 F.2d 1048. These cases are all distinguishable. In none of them did the serviceman's attack on the validity of his discharge ("general" in McCurdy's case, "undesirable" in Tuggle's case, and "dishonorable" in Stanford's) deal with the issue of procedural due process in the hearings or review procedures which ultimately produced the termination of the services of each.

McCurdy had a full hearing before the Board of Officers at which this Court said "He was ably represented by both military and civilian counsel. After a full hearing, the Board found," etc. Nothing appears from the per curiam opinion in Tuggle that the airman had been denied a full hearing. In *Stanford*, the court dealt with a challenge to the validity of a court martial which had culminated in a dishonorable dis-

charge. His attack was based on the contention that he had been denied the constitutional right to indictment by grand jury and trial by petit jury. This Court pointed out the fact that the constitution expressly excepts cases arising in the armed forces from the guarantee of indictment and that the Supreme Court had held that trial by jury was not guaranteed in court martial proceedings, citing Whelchel v. McDonald, 1950, 340 U.S. 122, 71 S.Ct. 146, 95 L.Ed. 141.

In this case, the very defect which Lt. Sims asserts here as the basis for his action in the court is one that would prevent the preparation of the kind of record which should be made available for all parties to use at any hearing before the Board for Correction of Military Records. This contention being based upon a procedural defect that goes to the preparation of the record itself is not only a distinguishing characteristic from the prior cases, but it seems clear that it requires a holding that this case presents a proper issue for the court to decide in the present litigation. Without an opportunity to appear before the Personnel Board, it is impossible to see how that Board could adequately appraise Lt. Sims as to his potential for continued service in the Air Force.

Moreover, although perhaps in light of this court's decision in *McCurdy, supra*, not sufficient of itself to warrant judicial intervention prior to actual discharge, we may also take judicial notice of the fact that serious interruption of the duties of a qualified flying officer of the Air Force might have a substantially deleterious effect on his future capabilities and opportunities for promotion so that a complete separation from the service for a substantial period of time would jeopardize his future in the service were he ultimately to prevail.[3]

[3] We conclude therefore that this action should not be dismissed for failure of Lt. Sims to await his final discharge,

3. For a full discussion of the developing law in cases of this kind see Judicial Review of Military Administrative Discharges, 83 Yale Law Journal 33.

after which he should then seek to have that discharge set aside and seek reinstatement from the Secretary of the Air Force rather than undertake to stay the discharge until he had been accorded a hearing with minimum due process as we have outlined above.

The judgment is reversed and the case is remanded to the trial court for further proceedings not inconsistent with this opinion.

Adm. Office, U.S. Courts—West Publishing Company, Saint Paul, Minn.

Grover William SIMS, Second Lieutenant, United States Air Force 418-66-6972FV, Plaintiff-Appellant,

v.

Cecil E. FOX, Brigadier General, etc., and Dr. John L. McLucas, Secretary of the Air Force, Defendants-Appellees.

No. 73-2707.

United States Court of Appeals, Fifth Circuit.

Dec. 30, 1974.

Reserve air force officer sought to enjoin the Air Force from discharging him without first giving him a hearing in person for purpose of presenting proof of his fitness for continued service. The United States District Court for the Middle District of Georgia, J. Robert Elliott, Chief Judge, dismissed the complaint and the plaintiff appealed. The Court of Appeals, 492 F.2d 1088, reversed and remanded with directions. On rehearing en banc, the Court of Appeals, Coleman, Circuit Judge, held that reserve officer had no "property right" in continued employment in the Air Force, and that the Air Force's action in honorably discharging officer after he pleaded nolo contendere to charge of indecent exposure did not deprive officer of "liberty" and officer was not entitled to due process hearing prior to discharge where officer's discharge paper would not reveal reason for his discharge, air force regulations denied employers or anyone else the opportunity to learn circumstances of officer's discharge and officer did not deny truth of charges against him.

Judgment of District Court affirmed.

Synopsis, Syllabi and Key Number Classification
COPYRIGHT © 1974, by WEST PUBLISHING CO.
The Synopsis, Syllabi and Key Number Classification constitute no part of the opinion of the court.

INDEXED

Tuttle, Circuit Judge, with whom Wisdom, Bell, Goldberg, Godbold and Morgan, Circuit Judges, joined, dissented and filed opinion.

1. Constitutional Law ⇐277(2)

Under statute providing that reserve officers may be discharged at the pleasure of the President, reserve air force officer had no property right in continued employment in the Air Force such as would entitle him to due process hearing prior to his honorable discharge, despite contention that such property right was conferred by officer's expectation of full tour of duty, by an implied promise of continued service or by an "understanding" between himself and the Air Force. 10 U.S.C.A. § 1162; U.S.C.A.Const. Amend. 5.

2. Constitutional Law ⇐255(2)

Governmental attack on one's good name, reputation, honor and community standing can be a deprivation of liberty within the Fifth and Fourteenth Amendments. U.S.C.A. Const. Amends. 5, 14.

3. Constitutional Law ⇐255(2)

Governmental communication of derogatory information to employers may constitute an attack on "liberty" within meaning of Fifth and Fourteenth Amendments. U.S.C.A. Const. Amends. 5, 14.

4. Constitutional Law ⇐83(1), 318(2)

Air Force's honorable discharge of reserve officer following officer's plea of nolo contendere to charge of indecent exposure in state court did not deprive officer of "liberty" and officer was not entitled to due process hearing prior to such discharge where officer's discharge paper would not reveal reason for discharge, air force regulations denied employers or anyone else the opportunity to learn circumstances of the discharge, there were no allegations indicating reasonably anticipated likelihood that Air Force would reveal officer's record to potential employers and officer did not deny the charges against him. U.S.C.A.Const. Amends. 5, 14.

5. Constitutional Law ⇐83(1)

Mere presence of derogatory information in an employer's confidential files does not infringe protected "liberty." U.S.C.A.Const. Amends. 5, 14.

6. Constitutional Law ⇐83(1)

Government has not infringed "liberty" by permitting others to learn reasons for discharge of government employee unless it has perpetuated untrue charges. U.S.C.A.Const. Amends. 5, 14.

Appeal from the United States District Court for the Middle District of Georgia.

Before BROWN, Chief Judge, and TUTTLE, WISDOM, GEWIN, BELL, THORNBERRY, COLEMAN, GOLDBERG, AINSWORTH, GODBOLD, DYER, SIMPSON, MORGAN, CLARK, RONEY and GEE, Circuit Judges.

COLEMAN, Circuit Judge.

This is an action by Air Force Lieutenant William Sims against Air Force General Cecil Fox and the Secretary of the Air Force. Sims asks that the Air Force be enjoined from discharging him without first giving him a hearing in person to present proof of his fitness for continued service.

The District Court dismissed Sims' complaint for failure to state a claim upon which relief could be granted. A Panel of this Court reversed, Sims v. Fox, 5 Cir., 1974, 492 F.2d 1088. We granted the petition for rehearing *en banc*, and again consider the correctness of the dismissal.

We affirm the Judgment of the District Court.

Lt. G. William Sims was ordered to active duty on July 14, 1971. His performance of duty was good. Until June, 1972 his off-duty life was unremarkable. In that month, Sims was arrested for two separate acts of indecent exposure. Specifically, on June 20 and June 23 he was charged with exposing his sexual organs to females. He was released on bond.

In September of 1972, Mrs. Carol Barnett, a civilian, reported to military authorities that Sims on two occasions had exposed himself to her minor children, ages six, nine, and four. Sims was again charged with indecent exposure.

On 4 January, 1973, Sims was tried in a Georgia state court. Under a Georgia statute providing for special treatment for first offenders,[1] he was allowed to plead *nolo contendere* and was placed on probation for a year. Although the Georgia Court made no adjudication of guilt, Sims has never denied that he, in fact, committed the acts with which he was charged.

On January 24, 1973, Sims was notified by his Wing Commander that discharge proceedings[2] were being initiated.

1. 27-2727 through 27-2732, Ga.Code Ann.

2. The discharge procedure is that specified in Air Force Regulation 36-2 which provides, in relevant part, that a Wing or Base Commander, having received information indicating that an officer is unfit for continued service, notifies the officer of the charges against him and advises the officer that he has 15 days within which to submit written statements and documentary evidence. If, after considering the evidence, the Commander concludes that discharge is appropriate, he forwards the documented case to Air Force Headquarters.

At Air Force Headquarters, the case is referred to the Air Force Personnel Board which, after reviewing the evidence, makes its recommendation to the Secretary of the Air Force. The Secretary is the person who makes the final decision as to whether the officer should be retained or discharged.

The Secretary's order to discharge a serviceman is not necessarily the end of the matter. Following discharge, limited post-discharge relief is available.

10 U.S.C. § 1552 provides:

"(a) The Secretary of a military department, under procedures established by him and approved by the Secretary of Defense, and acting through boards of civilians of the executive part of that military department, may correct any military record of that department when he considers it necessary to correct an error or remove an injustice. Under procedures prescribed by him, the Secretary of the Treasury may in the same manner correct any military record of the Coast Guard. Except when procured by fraud, a correction under this section is final and conclusive on all officers of the United States.

* * * * * * * * * *

Sims was given 15 days in which to submit written statements and documentary evidence.

In response, Sims submitted a letter from a superior officer characterizing him as "one of my most trustworthy subordinates", a letter from a psychiatrist saying that Sims is "men-

"(c) The department concerned may pay, from applicable current appropriations, a claim for the loss of pay, allowances, compensation, emoluments, or other pecuniary benefits, or for the repayment of a fine or forfeiture, if, as a result of correcting a record under this section, the amount is found to be due the claimant on account of his or another's service in the Army, Navy, Air Force, Marine Corps, or Coast Guard, as the case may be.

* * * * * * * * * *

"(d) Applicable current appropriations are available to continue the pay, allowances, compensation, emoluments, and other pecuniary benefits of any person who was paid under subsection (c), and who, because of the correction of his military record, is entitled to those benefits, but for not longer than one year after the date when his record is corrected under this section if he is not reenlisted in, or appointed or reappointed to, the grade to which those payments relate. Without regard to qualifications for reenlistment, or appointment or reappointment, *the Secretary concerned may reenlist a person in, or appoint or reappoint him* to, the grade to which payments under this section relate." [Emphasis added.]

10 U.S.C. § 1553 provides:

"(a) The Secretary concerned shall, after consulting the Administrator of Veterans' Affairs, establish a board of review, consisting of five members, to review the discharge or dismissal (other than a discharge or dismissal by sentence of a general court-martial) of any former member of an armed force under the jurisdiction of his department upon its own motion or upon the request of the former member or, if he is dead, his surviving spouse, next of kin, or legal representative. A motion or request for review must be made within 15 years after the date of the discharge or dismissal.

"(b) A board established under this section may, subject to review by the Secretary concerned, change a discharge or dismissal, or issue a new discharge, to reflect its findings.

"(c) A review by a board established under this section shall be based on the records of the armed forces concerned and such other evidence as may be presented to the board. A witness may present evidence to the board in person or by affidavit. *A person who requests a review under this section may appear before the board in person or by counsel or an accredited representative of an organization recognized by the Administrator of Veterans' Affairs under chapter 59 of title 38.* As amended Pub.L. 87-651, Title 1, § 110(a), Sept. 7, 1962, 76 Stat. 509." [Emphasis added.]

tally and emotionally capable of performing his old duties and occupation", along with the Georgia court order which discharged him without an adjudication of guilt. However, Sims wrote his Commander that "this information does not deny the basic allegations against me".

Unpersuaded by the evidence submitted by Sims, the Secretary of the Air Force ordered Sims honorably discharged.

The exact terms of the discharge are important. At the time Sims was notified of his prospective discharge and at the time the Panel heard Sims' appeal, Air Force regulations provided that the discharge certificate (DD Form 214) would contain a code [3] which, upon inquiry, would reveal that Sims was discharged because of "fail[ure] to meet the standards of conduct and performance prescribed by the Secretary of the Air Force",[4] and would further reveal that the discharge was related to Sims' "unfitness, unacceptable conduct or in the interest of national security." [5] As the Panel observed,

> "Simply stated, an honest inquiry into the basis for Sims' discharge would demonstrate that [Sims] had been given a discharge for reasons that would greatly undercut the status of the discharge as 'an honorable discharge.' . . . There can be no doubt but that Sims' discharge [would be] a flawed passport back to civil[ian] life." 492 F.2d at 1091.

Since the rendition of the panel decision, there has been a significant change in Air Force regulations. They now provide that the code explaining the reason for discharge will not be put on the discharge certificate.[6] The certificate "on its face" does not reveal the reason for discharge. Furthermore, the regulations specify that narrative reasons for discharge can be obtained only by a former "member furnish[ing] the original DD Form 214 for the period of service for which he

3. 5DN 588 Par. 37 AFR 36-12.
4. Air Force Regulation 36-12.
5. Air Force Regulation 36-12.
6. Air Force Regulation 35-6, ¶ 4-5, effective 1 May 1974.

desires the narrative reasons for separation".[7] As explained by Air Force correspondence, "narrative reasons for separation are to be furnished only to the member and then only upon his request and provided the member can furnish the original DD Form 214."[8]

Sims' contention is that notwithstanding the honorable character of the discharge and notwithstanding the fact that there is nothing on the face of the discharge paper (DD Form 214) to indicate the reason for discharge, he is entitled to a pre-discharge hearing. Sims says that the Air Force, by discharging him on the ground of sexual deviancy, is denying him "liberty" and "property" and he is therefore entitled to the "due process" guaranteed by the Fifth Amendment.

Sims raises these claims despite 10 U.S.C. § 1162 which provides that a reserve officer such as Sims may be discharged "at the pleasure of the President".

I. *The Property Claim*

[1] Sims first claims that he has a "property right" in continued employment in the Air Force. In his brief, Sims says that the property right is conferred by his "expectation of a full tour of duty", by "an implied promise . . . of continued service . . .", or by an "understanding" between himself and the Air Force.

A substantially similar claim was considered in Board of Regents of State College v. Roth, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972). In that case, a non-tenured state college professor claimed, *inter alia*, that the State's refusal to renew his contract was a deprivation of his "property" and that he was therefore entitled to a pre-discharge hearing. The Supreme Court responded that a non-tenured professor, who was given no right to contract renewal either by state

7. Air Force Regulation 35-6, ¶ 4-6, effective 1 May 1974.

8. Official Air Force Correspondence 252100 dated April, 1974.

law or by expressed or implied terms of his contract, had no property interest in continued employment.

"To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it.

. . . . . .

"[The] terms [of plaintiff's appointment] secured his interest in employment up to June 30, 1969. But the important fact in this case is that they specifically provided that the respondent's employment was to terminate on June 30. They did not provide for contract renewal absent 'sufficient cause.' Indeed, they made no provision for renewal whatsoever.

"Thus, the terms of the respondent's appointment secured absolutely no interest in re-employment for the next year. They supported absolutely no possible claim of entitlement to re-employment. Nor, significantly, was there any state statute or University rule or policy that secured his interest in re-employment or that created any legitimate claim to it. In these circumstances, the respondent surely had an abstract concern in being rehired, but he did not have a *property* interest sufficient to require the University authorities to give him a hearing when they declined to renew his contract of employment." 92 S.Ct. at 2709–2710.

The present facts are similar to those in *Roth* in that there is nothing in Sims' contract or in any statute creating a right to continued employment. The statute specifically negates the right of a reserve officer to continued employment; reserve officers may be discharged "at the pleasure of the President", 10 U.S.C. § 1162. Thus, the statute explicitly provides that one has no vested right to continue in the employment of the United States Armed Forces. One who may be discharged "at the pleasure" of another; i.e., arbitrarily, for no cause whatsoever, simply has no property right to

continued employment. The statute could not have expressed that proviso in any more specific terms.

Apparently recognizing that the source of his alleged property right to employment cannot lie in the statute, plaintiff claims he is given such a right by "understanding" or "implied promise". That a property right may spring from such a source is supported by language in *Roth, supra*, and also by the holding in Perry v. Sindermann, 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972). In the latter case, a non-tenured professor complained, *inter alia*, that he had been deprived of "property" because his contract had not been renewed. There was no statute and no contract that gave him a right to contract renewal. Rather, the plaintiff argued that the college had a "de facto" tenure policy. This policy was expressed in the college's faculty guide which provided:

> "*Teacher Tenure*: Odessa College has no tenure system. The Administration of the College wishes the faculty member to feel that he has permanent tenure as long as his teaching services are satisfactory and as long as he displays a cooperative attitude toward his co-workers and his superiors, and as long as he is happy in his work." 92 S.Ct. at 2699.

Additionally, plaintiff there relied upon guidelines published by the state college board indicating that a person who had been employed as a teacher enjoyed a form of tenure.

These "policies and practices" of the school and the Board of Trustees, the Court said, could create a property interest. It was not necessary that an employment contract or a statute specifically create the interest.

The *Perry* case supports plaintiff's argument in the sense that it indicates that there is no rigid limit to the sources of property rights. Such rights may be derived from statutes, from explicit contracts, or, as was true in *Perry*, from state declared policies.

But there are still limits on those things that can be considered "property rights". There must be some reasonably identifiable source from which the rights spring; they cannot emanate, as was said in *Perry*, from "mere subjective expectancy", 92 S.Ct. at 2700. The law still recognizes the immutable notion that something cannot spring from nothing. One cannot create for himself a property by proclaiming its existence.

In this case, Sims says he has a property right to continued employment, but he can point to nothing other than his own expectancy for the creation of that right. No statute created it; indeed, the statute expressly denied its existence. Neither has Sims pointed to any express terms in his contract or to any governmental regulation that might have led him to believe he had such a right. An Air Force contract or regulation cannot grant that which Congress has specifically withheld. The Air Force must act within the authority delegated to it by Congress or, in certain cases, by the President. Any "regulations" or "contracts" attempted in excess of that authority would be void.

Sims has no property right in continued military employment because there is no source for it other than his own "expectancy". The applicable statute specifically denies the right.

II. *The Liberty Claim*

Appellant's second theory is that the Air Force action under the circumstances of this case deprives him of "liberty". The "liberty" allegedly taken is his "good name, reputation, honor, and community standing". In this respect Sims' contention is less convincing than when the Panel originally decided his appeal. At that time, appellant's prospects were that he would receive a discharge paper (Form DD 214) which on its face would contain a code which, upon inquiry or investiga-

tion, would reveal that he had been discharged for "unfitness, unacceptable conduct, or in the interest of national security".[9]

The Air Force no longer uses the code which would have revealed the reason for his discharge. The discharge paper which he is now about to receive will not reveal the reason for the discharge. Moreover, Air Force regulations prescribe that reasons for the separation are to be furnished only to the serviceman.[10]

Thus, as Air Force regulations now stand, appellant will receive an honorable discharge which will not indicate the reason for the discharge. Persons outside the military can obtain the reason for discharge only in the remote event that the Air Force disregards its own regulation. His contention that his liberty interest is infringed by Air Force action is therefore necessarily reduced to a possibility that the Air Force might allow the derogatory information to "escape".

[2] It is, of course, established law that a governmental attack on one's "good name, reputation, honor, and community standing" can be a deprivation of "liberty", within the meaning of the Fifth and Fourteenth Amendments. This was the holding in Wisconsin v. Constantineau, 400 U.S. 433, 436-437, 91 S.Ct. 507, 510, 27 L.Ed.2d 515 (1971), which involved the constitutionality of a Wisconsin statute allowing specified governmental officials to post in public establishments the names of persons who were not to be sold intoxicating liquors. The Supreme Court held this statute to be an unconstitutional denial of "liberty" since the persons whose names were posted were exposed to public embarrassment and ridicule. One's "good name, reputation, honor, and community standing" cannot be taken from him, the Court said, without a hearing in which the truth of the posted matter may be tested.

9. Air Force Regulation 36-12.

10. Air Force Regulation 35-6, ¶ 4-6, effective 1 May 1974.

A more recent Supreme Court pronouncement that "liberty" is lost when one's "good name, reputation, honor, and community standing" are falsely attacked is found in *Roth, supra*, where the Supreme Court held, *inter alia*, that plaintiff (a non-tenured school teacher whose contract was not renewed) was not denied "liberty" within the meaning of the Fourteenth Amendment since the non-renewal of his contract was not based upon any charge which

> "might seriously damage his standing and associations in his community. It did not base the nonrenewal of his contract on a charge, for example, that he had been guilty of dishonesty, or immorality. Had it done so, this would be a different case.
>
> . . . . . .
>
> "Similarly, there is no suggestion that the state, in declining to reemploy the respondent, imposed on him a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities. . . ." 92 S.Ct. at 2707.

[3] In brief, *Roth* teaches that the government's attack on one's reputation may infringe constitutionally protected liberty in two respects: (1) governmental degradation of one's standing in his community may be a denial of "liberty"; (2) governmental communication of derogatory information to employers may be an attack on "liberty".

[4] Under the first test, plaintiff's reputation in his community has not been attacked. The community in which plaintiff will live after discharge can be expected never to know from public records of the circumstances of his discharge.

As to the second, Air Force regulations specifically deny that employers, or anyone else, can learn of the circumstances of the discharge. In the absence of allegations indicating a reasonably anticipated likelihood that the Air Force, notwith-

standing its regulations to the contrary, would reveal plaintiff's record to potential employers, the complaint is purely speculative.

Infringement of "liberty", as defined in the *Roth* guidelines, is not, on substantial possibility, involved in this case.

[5] Thus the case is reduced to whether the mere presence of derogatory information in an employer's confidential files is an infringement of liberty.

Arguably, the very presence of derogatory information in an employer's confidential records infringes protected "liberty" since it denies a person the freedom he otherwise would have to use his record for his own benefit by voluntarily making it available to future employers. The contrary argument would be that the harm suffered by the mere presence of damaging information in a confidential file is not substantial enough to amount to an infringement of "liberty" in the constitutional sense. In this Circuit the law on that subject is settled. In Collins v. Wolfson, 5 Cir., 1974, 498 F.2d 1100, 1104, state university teachers made various claims that the state university for which they worked was depriving them of "liberty" within the meaning of the Fourteenth Amendment "due process" clause. The claim of three of the teachers was that constitutional rights were violated because school officials had placed unfavorable memoranda in their files concerning their activities on behalf of a teachers' union. This Court summarily disposed of the teachers' claim saying that "lodging these memos, without more, in the instructors' respective files gives rise to no constitutionally based grievance". The mere presence of derogatory information in *confidential* files is not an infringement of "liberty".

Additionally, it is not to be overlooked that Sims has not denied the truth of the charges against him. In his letter to his commanding officer, Sims stipulated that "this information does not deny the basic allegation". As his counsel explained at the *en banc* hearing, Sims seeks an Air Force hearing not to refute the charges but only to present mitigat-

ing considerations. That makes this a case in which appellant claims that constitutionally guaranteed liberty is infringed because the government is about to put the undenied truth in its own records. This need not long detain us.

In the recent decision, Arnett v. Kennedy, 416 U.S. 134, 164, 94 S.Ct. 1633, 1649, 40 L.Ed.2d 14 (1974), the Supreme Court refers to an employee's "liberty" right as being the right to be free from being "*wrongfully* stigmatized by untrue and *unsupported* administrative charges".

[6] In conclusion, we hold, as basic propositions, (1) that liberty is not infringed by the *mere presence* of derogatory information in *confidential* files and (2) the government has not infringed "liberty" unless it perpetuates *untrue* charges. Thus, in the absence of a denial of the truthfulness of the allegedly offending material, there is no necessity for a hearing; there is no disputed fact requiring resolution as the result of a hearing.

For the foregoing reasons we think the dismissal of the complaint must be allowed to stand, making it unnecessary to discuss the case in the light of Hodges v. Callaway, 5 Cir., 1974, 499 F.2d 417 (exhaustion of administrative remedies) or Arnett v. Kennedy, 1974, 416 U.S. 134, 94 S.Ct. 1633, 40 L.Ed.2d 14 (post discharge evidentiary process sufficiently protected "liberty" interest).

The Judgment of the District Court is

Affirmed.

TUTTLE, Circuit Judge, with whom WISDOM, BELL, GOLDBERG, GODBOLD and MORGAN, Circuit Judges, join (dissenting):

With utmost deference to the views of my colleagues I am constrained to dissent.

I do so because I am fully convinced that Lt. Sims has a "property" right and a "liberty" right, as these terms are discussed in the majority opinion, to be protected under the

Fifth Amendment to the Constitution. As I read the majority opinion, it holds that he has neither; it precludes this officer from ever claiming the right to a personal appearance, either before or after discharge, to undertake to convince those in authority that, instead of being discharged for immoral conduct, his potential as an Air Force officer is such as to warrant his retention in the service until the normal expiration of his tour of duty. This follows, it seems to me, because the Court holds that he has neither a property nor a liberty interest to protect, and without either he, of course, has no claim to procedural due process.

Because the opinion does not deal with the exhaustion of administrative remedies, I refer only to what has been said with respect to this in the panel opinion, calling attention, however, to that part of footnote No. 2 of the majority opinion, which cites 10 U.S.C.A. § 1553 and which italicizes the language "*a person who requests a review under this section may appear before the board in person or by counsel or an accredited representative of an organization recognized by the Administrator of Veteran's Affairs* under chapter 59 of title 38." I comment on this because, as stated in the panel opinion, and as conceded at all times by the Government, the provisions of § 1553 do not permit the board created thereunder to reinstate an airman or officer, once he has been discharged. I am concerned lest the italicizing of the above language may inadvertently convey the impression that such a right is available after discharge.

Of course, as also commented on in the panel opinion, and as conceded by the Government, § 1552 under which the Secretary *may* reinstate an officer, does *not* guarantee a personal appearance of a discharged airman or officer, seeking to have his discharge revoked.

It is unnecessary to repeat the facts that led to the filing of this lawsuit. It seems fair to assume for the purpose of this opinion that the majority would recognize that Lt. Sims is being deprived of a "liberty" right, protected by the due

process clause of the Fifth Amendment, were it not for the change in regulations instituted by the Air Force since the filing of this action. The majority concludes that the change has the effect of keeping hidden the reason for discharge because the Air Force merely retains information that Sims has been discharged for the reasons outlined in paragraph S 4D(4) of Air Force Regulation 36–2 solely within its own confidential files.

The opinion of the Court comments on the fact that under Air Force Regulation 35–6, paragraph 4–6, effective 1 May 1974,[1] only the Air Force itself, and the officer, at his own election, will now have the damaging information as to the "reason for discharge."

With deference, I feel constrained to say that this theory of denying Lt. Sims a hearing with minimal due process is based upon what I consider to be the erroneous theory that what the officer and the courts should be concerned about is to keep from potential future employers the truth of the facts leading to Lt. Sims' discharge. This, it seems to me, is to place principal emphasis on the cosmetic effect of the new form of entries on the officer's discharge certificate rather than to place it on the question whether he is entitled to have procedural due process before the Air Force takes the *action*, based on the unsavory factor. I would assume that this Court would

1. This document appears to be an interim modification which states on its face that it is "effective 1 May 1974 and pending receipt of formal printed change," in AFM 35–6. In fact we have been supplied with what appears to be the printed change in Air Force Regulation 35–6 dated 3 July 1974, which makes it clear that the regulation change cited in the opinion for the proposition that Air Force Regulations "prescribe that reasons for the separation are to be furnished only to the serviceman" do not apply at all to an original discharge certificate. They deal only with *modified* discharges given at the request of an enlisted man or officer, seeking to have his previously obtained discharge certificate modified by having the SDN code numbers eliminated. We have been furnished with no regulations, so far as I am aware, that so strictly limit the giving of information as to either a narrative statement for the "reason of discharge" or the code numbers that lead inevitably to the same result.

expect a former officer of the United States Air Force, when asked by a prospective employer what was meant by the two dash marks that are now entered in all discharge certificates opposite the entry "reason for discharge" would tell the truth. Failure to do so would be a fraud on a prospective employer. For Lt. Sims to answer this question under the proposed action of the Air Force, he would in honesty, be compelled to say "I was discharged for the reasons spelled out in Air Force Regulations 36–2 as outlined in paragraph 4(d)(4) of that Regulation." Then, upon being asked what is meant by that, he would have to say "Sub-paragraph (d)(4) is entitled 'sexual perversion' and it reads 'this includes but is not limited to . . . (4) indecent exposure.'" The fact that this language is not "communicated" by the Air Force to prospective employers, either by having it inserted, as it was previously, on the discharge certificate at the time this lawsuit was filed, or in response to requests by future employers, makes no difference.

Lt. Sims has to live the rest of his life with his military record. The question before this Court, it seems to me, is whether his military career should be terminated by the Air Force forcing on him a discharge on the grounds of immoral conduct without his being afforded any procedural due process to explain away or overcome the effects of his misconduct. The wound resulting from a denial of an opportunity to this officer to have such a hearing is much more than skin deep. It goes to the vitals of his future career.

Of course, this Court would not pretend to prejudge the result of a proper hearing, if one were accorded to Lt. Sims. If the Air Force, after according him whatever rights he is entitled to under our concept of procedural due process, determines that no matter how much rehabilitation has been, or can be, achieved, and no matter how satisfactory his military record may be, his acts were such as to render him unfit to continue service in the Air Force, then he would have to live with the discharge certificate given him as a result of such

misconduct and that would be the end of the matter. His only hope, and it is a hope that seems to justify the Court's intervention, is that before he is discharged for any reason challenging his "good name, reputation, honor, or integrity" he is entitled to such due process as we have described in the panel opinion. He should have an opportunity to be present and make an effort to persuade the appropriate officials that such circumstances as he wishes to bring before them demonstrate that he has sufficient potential to make him a proper and suitable officer to remain in the service until the end of his normal tour of duty. Under such circumstances, of course, he would then receive a discharge certificate designating normal termination of service, and this would be his passport back to civil life.

However, the impression conveyed by the majority opinion that the unsavory information designated by SDN 588, signifying a discharge on the ground of "unfitness and/or unsuitability," is kept a closely-guarded secret within the Air Force headquarters is not, in my opinion, borne out by the appropriate regulations, as amended on July 2, 1974. These amended regulations do away with the former requirement that, at the proper space following the item "reason for discharge" an entry be made which, when traced to the appropriate Air Force regulations, clearly gives the reason for the discharge. As heretofore pointed out this code number in Lt. Sims' case was 588, and it was a clear statement of the reasons for discharge. Under the new regulations, no SDN entry is made on the original discharge certificate which is given to the officer himself. Instead, this space is filled with two dash marks. However, there are a total of eight copies of this discharge certificate provided for under these amended regulations. Copy no. 2 is the master personnel record copy, and it presumably remains at Air Force Headquarters. However, copies numbers 6 and 8 are sent to other interested parties. Regulations provide that copy no. 6 is to be "forward[ed] to NG ANG PMO WASH DC 20310, for review and transmittal

to the appropriate state adjutant general." [Emphasis added.] Copy no. 8 is required by regulations to be "forward[ed] to USAF RECTG SVC Randolph AFB TX 78148." (This is clearly the U.S. Air Force Recruiting Service, Randolph Air Force Base, Texas.)

The Government does not in any way seek to minimize or conceal the fact that these copies, containing the SDN designation are sent to the Air Force Recruiting Service Headquarters and to the State Adjutant General of the officer's home state, nor is any effort made to conceal the reason for this action. The reason is perfectly clear, but it is one which has largely escaped the attention of the Court, other than the comment in the original panel opinion calling attention to the fact that the discharge given to Lt. Sims will carry a designation which makes him *ineligible ever to return to service in the Air Force, the Air Force Reserve, or the Air National Guard.* In the truest sense of the word he will have been "blacklisted."

It is not the fact that the adjutant general of the state of the residence of the airman or officer, (who incidentally, is a state official, and who may share the unsavory record concerning the officer with the state's personnel computer, so far as the record discloses) that concerns me the most. It is the *purpose* for which this information is transmitted to the state adjutant general and to the Air Force Recruiting Service.

Any recruiting officer or state adjutant general who might, at some future date be inclined to yield to Lt. Sims' request that he be permitted to serve in the National Guard or reserve forces of the United States Air Force as an enlisted man or officer in time of peace or on active duty in time of national emergency will now have been permanently forbidden to do so as the result of this discharge, based as it is on Air Force Regulation 36–2 pursuant to AFR 36–12 SDN 588 and the code number determining him to be unfit for further recall.

This lifetime bar to future opportunity to participate in a potentially lucrative profession, either full-time, or as a part-

time activity,[2] it seems to me, brings the case squarely within the exception noted in the *Roth* case, relied on in the majority opinion. For instance, the opinion contains the following quote from *Roth*. "[The Board of Regents] did not base the nonrenewal of his contract on a charge, for example, that he had been guilty of dishonesty or immorality. *Had it done so, this would be a different case.*" [Emphasis added.]

Also quoted is the following. "Similarly, there is no suggestion that the state, in declining to re-employ the respondent, *imposed on him a stigma or other disability that foreclosed his freedom to take advantage of other* employment opportunities. . . . " [Emphasis added.]

Here, of course, the Army did base Lt. Sims' discharge "on a charge . . . that he had been guilty of . . . immorality." Furthermore, it is clear that in discharging Sims the Air Force "imposed on him a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities . . . ."

This is a wholly separate matter from that discussed in the majority opinion, dealing with Lt. Sims' opportunities to obtain jobs in the commercial world which, the Court seems to consider unimpaired because his discharge certificate does not on its face carry the perjorative words or code number.[3]

2. There is, of course, the further substantial question whether by such action the Air Force can deprive this officer permanently from exercising the right common to every citizen of offering his services by way of military duty, from purely a sense of obligation, without any due process hearing. Removal of such a disqualification, which if imposed by legislative act, would be a "bill of attainder" prohibited by the Court, Art. 1, § 9, Cl. 3, might well be one of the rights, hoped to be protected by an officer permitted to appear in person before a hearing board.

3. Not a word is said in the Roth illustrations about "communication" of this stigma to the community. The Court speaks to the Board's *action* as not being based on charges affecting his character. The Court, as I read its language, says that if the Board of Regents had *based its non-renewal* of teacher's contract on such a charge, "This would be a different case." So, too, in the second quotation, the Air Force is imposing on Lt. Sims a stigma or other disability that will "foreclose(d) his freedom to take advantage of other

If there can be any doubt about the nature of the "liberty" right of Lt. Sims which is here threatened, after reading the exception stated in *Roth, supra*, the following language from that opinion would, it seems to me, dispel any doubt. Immediately following the language: "the state, for example, did not invoke any regulations to bar the respondent from all other public employment in state universities,"[4] the court said "had it done so, this, again, would be a different case for '[t]o be deprived not only of present government employment but of future opportunity for it certainly is no small injury . . .' Joint Anti-Fascist Refugee Committee v. McGrath, *supra*, 341 U.S. at 185, 71 S.Ct. at 655 (Jackson, J., concurring). *See* Truax v. Raich, 239 U.S. 33, 41, 36 S.Ct. 7, 10, 60 L.Ed. 131. The Court has held, for example, that a State, in regulating eligibility for a type of professional employment, cannot foreclose a range of opportunities 'in a manner . . . that contravene[s] . . . Due Process.' Schware v. Board of Bar Examiners, 353 U.S. 232, 238, 77 S.Ct. 752, 756, 1 L.Ed.2d 796, and, specifically, in a manner that denies the right to a full prior hearing. Willner v. Committee on Character, 373 U.S. 96, 103, 83 S.Ct. 1175, 1180, 10 L.Ed.2d 224. *See* Cafeteria Workers v. McElroy, *supra*, 367 U.S. at 898, 81 S.Ct. at 1750. In the present case, however, this principle does not come into play." Board of Regents v. Roth, 408 U.S. 564, 573, 92 S.Ct. 2701, 2707, 33 L.Ed.2d 548.

Although I feel that the strength of Lt. Sims' position with respect to the protection of his liberty right is sufficient to warrant the Court's intervention with this proposed discharge until he has had minimal due process I think some comment is proper with respect to the existence of a property right, also.

employment opportunities", i. e. to follow his desire to participate in the future in the reserve or National Guard programs of the Air Force, and since the state adjutant general is a recipient of the coded discharge, from any other state or military activities.

4. Here it did invoke regulations to effectively bar Sims from all public employment in the military services of the United States and of his own state.

I have no doubt that the arbitrary determination by the military officials involved that Lt. Sims shall be forever barred from further military service in the United States, without a hearing or proceeding that in any way approximates a trial is just as much a deprivation of a property right as would be the action of a board of bar examiners to deny an individual the right to a certificate to practice law on constitutionally suspect grounds. *See* Schware v. Board of Bar Examiners, 353 U.S. 232, 77 S.Ct. 752, 1 L.Ed.2d 796 and Willner v. Committee on Character, 373 U.S. 96, 83 S.Ct. 1175, 10 L.Ed.2d 224. As to its deprivation of such a right, the Court, in language quoted with approva in *Roth*, said: "a State, in regulating eligibility for a type of professional employment, cannot foreclose a range of opportunities 'in a manner . . . that contravene(s) . . . Due Process,'" Schware v. Board of Bar Examiners, 353 U.S. 232, 238, 77 S.Ct. 752, 756, 1. L.Ed.2d 796. How can Lt. Sims' black listing from all future military service for state or nation be distinguished?

In sum, I think that Lt. Sims' liberty is threatened both as to his potential for all future employment opportunities, regardless of the absence of the unfavorable entry on the face of his discharge certificate. I think this is clearly implied in the language quoted from the *Roth* opinion. I also think that his liberty and property rights are both threatened by the attainder against his ever having the right to serve in the state or federal military forces. The authority of the President to discharge an officer at his pleasure does not, it seems to me, extend this right to bar him from competing with all other citizens in the future to serve his country in the Air Force, without some kind of trial or hearing with minimal procedural due process.

Adm. Office, U.S. Courts—West Publishing Company, Saint Paul, Minn.

APPENDIX "C"

MEMORANDUM AND ORDER

(Number and title omitted)
(Filed: July 9, 1973)

The Plaintiff was commissioned a Reserve Second Lieutenant in the United States Air Force on May 20, 1971. For reasons deemed sufficient by the Secretary of the Air Force, on May 2, 1973 the Secretary, acting through the Air Force Military Personnel Center, ordered that all appointments held by the Plaintiff be terminated and directed that the Plaintiff be honorably discharged pursuant to 10 U.S.C. §§ 1162 and 8447 and Air Force Regulation 36-2.

On May 8, 1973 the Plaintiff filed a complaint in this Court asserting that he was being denied rights of due process guaranteed by the United States

Constitution and contending that he would suffer irreparable injury unless the Defendants were enjoined from perfecting his discharge. Among other things, he contends that the Air Force is obligated to give him a full hearing on the question of his discharge. Since it appeared to the Court that the questions raised in the complaint would be mooted by the Plaintiff's discharge before a hearing could be had, a temporary restraining order was issued against the Defendants on May 8, 1973 barring any actions to change the Plaintiff's military status until further order of the Court.

In due course the Defendants filed a motion to dissolve the temporary restraining order which had been issued and to dismiss the complaint and filed

a brief in support thereof. Counsel for the Plaintiff in turn filed their brief in opposition to the Defendants' motion.

The Court has given careful consideration to the matter and has concluded that the Defendants' motion to dismiss should be sustained.

The Plaintiff's contention that his discharge without a hearing violates due process is contrary to established law. In Pauls v. Secretary of the Air Force, 457 F.2d 294 (1 Cir. 1972), it was said at page 297:

> "It is well-established law that military officers serve as the pleasure of the President and have no constitutional right to be promoted or retained in service and that the services of an officer may be terminated with or without reason."
>
> (Citing cases)

This issue was also dealt with by the District Court of the District of Columbia in Gutierrez v. Laird, 346 F. Supp. 289 (1972).

It was concluded in the Gutierrez case that a Reserve Officer has no right to a hearing prior to being given an honorable discharge.

O R D E R

According, the Defendants' motion to dismiss the complaint is sustained and the complaint is hereby ordered dismissed for failure to state a claim upon which relief can be granted.

S T A Y

This order shall be stayed for a period of ten (10) days to allow Plaintiff to make application, if he wishes, to the Court of Appeals for a further stay.

Entered this 9th day of July, 1973.

s/J. Robert Elliott

UNITED STATES DISTRICT JUDGE

...ooo...

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1235

GROVER WILLIAM SIMS, ETC., PETITIONER

v.

CECIL E. FOX, Brigadier General, United States Air Force, and JOHN L. MCLUCAS, Secretary of the Air Force

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

Petitioner is a probationary second lieutenant in the United States Air Force. On January 24, 1973, petitioner's commanding officer, acting pursuant to Air Force Regulation 36-2 (see Pet. App. B, p. 52, n. 2), initiated proceedings for petitioner's discharge from the Air Force for committing four specific acts of indecent exposure. Such acts constitute a basis for discharge under paragraph 4(d)(4) of Air Force Regulation 36-2 (see Pet. App. B, p. 65). In his written response to the charges against him, petitioner did not deny that he had committed the acts of indecent exposure; he contended instead that he should be retained in the military on the basis of (a) his military record, (b) a favorable psychiatric report, and (c) the expunction, upon petitioner's plea of *nolo contendere* as a first offender, of the criminal charges that arose from the acts of indecent exposure. Petitioner's file, including the

materials he had submitted in his own behalf, were reviewed by his major commander, the Air Force Personnel Board, and the Office of the Secretary of the Air Force. Following that review, petitioner was ordered to be honorably discharged, with the reason for his discharge to be shown on the discharge certificate as "SDN 588, paragraph 37, AFR 36-12," which would indicate that petitioner's discharge was due to unfitness or unacceptable conduct (but not homosexuality) (Pet. App. A, p. 37).

Petitioner then brought this action in the United States District Court for the Middle District of Georgia, requesting injunctive relief on the ground that he was constitutionally entitled to a full evidentiary hearing prior to discharge. The district court dismissed the complaint (Pet. App. C). A panel of the court of appeals reversed (Pet. App. A), holding that petitioner was entitled to a hearing before being issued a discharge certificate that "carries on its face evidence of serious professional or moral misconduct such as would seriously affect his reputation and opportunity for success in civil life" (Pet. App. A, p. 38).[1]

Shortly after the panel's decision, the Air Force regulations relating to the content of discharge certificates were amended to provide that honorable discharge certificates, such as petitioner's, would not indicate the reason for discharge (that is, would not carry the legend "SDN 588, paragraph 37, AFR 36-12")[2] or suggest in any way that

---

[1]The panel also held that petitioner was not required to exhaust his post-discharge administrative remedies. The court concluded that those remedies were not adequate because they would not necessarily provide the oral hearing that petitioner claimed as a matter of constitutional right (Pet. App. A, pp. 45-47).

[2]Those symbols will appear on copies retained by the Air Force for internal use. The copies furnished to the Veterans' Administration and the Selective Service System will contain a statement of the reason for discharge.

the discharge was for unfitness or improper conduct.

On rehearing *en banc*, the court of appeals reversed the panel's decision and affirmed the dismissal of the complaint (Pet. App. B). The court held that since petitioner's discharge did not deprive him of either a liberty or a property interest, he was not entitled to a full evidentiary hearing on the merits of his discharge.

As this Court noted in *Board of Regents* v. *Roth*, 408 U.S. 564, 569, "[t]he requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property." Since the interests asserted by the petitioner are not within the Fifth Amendment's similar protection of liberty and property, the deprivation of those interests does not implicate constitutional due process.[3]

---

[3]In any event, the pre- and post-discharge consideration afforded by the Air Force would have satisified any applicable due process requirements in the circumstances of this case. Since petitioner did not deny having committed the acts of indecent exposure, there was no material factual dispute. Accordingly, there was no issue appropriate for resolution in an evidentiary hearing; there was no need to present witnesses, or for cross-examination or confrontation. In these circumstances, petitioner's opportunity to submit a statement and supporting material satisfied any pre-discharge requirement of due process. *Arnett* v. *Kennedy*, 416 U.S. 134. Cf. *Federal Communications Commission* v. *WJR*, 337 U.S. 265. Following discharge, an officer can obtain an evidentiary hearing before the Air Force Discharge Review Board. 10 U.S.C. 1553. The Air Force Board for Correction of Military Records is authorized to change the character of a discharge, and the Secretary of the Air Force may reappoint a discharged officer to the service. 10 U.S.C. 1552. Accordingly, an officer has a full opportunity to clear his name following discharge, and that is all that due process requires where a liberty interest of that nature has been implicated. See *Two* v. *United States*, 471 F.2d 287 (C.A. 9), certiorari denied, 412 U.S. 931; *Reed* v. *Franke*, 297 F.2d 17 (C.A. 4).

a. It is, of course, well established that an individual possesses a liberty interest in his public reputation. Where the government proposes taking an action against an individual "that might seriously damage his standing and associations in his community * * * '* * * notice and an opportunity to be heard are essential.'" *Board of Regents* v. *Roth, supra*, 408 U.S. at 573. But no such liberty interest is present here.

The only purpose of a hearing, when proposed government action threatens to injure an individual's public reputation, "is to provide the person an opportunity to clear his name." *Board of Regents* v. *Roth, supra*, 408 U.S. at 573, n. 12. That purpose would not have been served by requiring a hearing to be held prior to petitioner's discharge, for petitioner did not dispute the allegations of indecent exposure. Petitioner did not request a hearing in order to clear his name of false charges, but rather in effect, to make a plea for lenient treatment. Due process does not require the holding of a hearing for that purpose.

Moreover, under the amended regulations, the reason for discharge will not appear on petitioner's discharge certificate; accordingly, prospective employers and other persons to whom the plaintiff might display his discharge certificate will not be able to tell that the petitioner has received anything other than a fully honorable discharge. Petitioner's discharge, therefore, has no substantial potential for seriously damaging petitioner's standing and associations in his community; it will not affect his public reputation. Although the reason for the discharge will be retained in confidential government files, the mere presence of derogatory information in such files will not deprive petitioner of his liberty interest in his public reputation.

b. Property interests "are created and their dimensions are defined by existing rules or understandings * * *." *Board of Regents* v. *Roth, supra*, 408 U.S. at 577. With respect to an individual's employment, "[n]o property interest would be conferred, for example, where the applicable statutory or contractual terms, either expressly or by implication, did not provide for continued employment absent 'cause'." *Arnett* v. *Kennedy, supra*, 416 U.S. at 167, n. 2 (concurring opinion of Mr. Justice Powell).

As a probationary Air Force Reserve officer, petitioner has no property interest in continued employment: it is expressly provided by statute that "reserve commissioned officers may be discharged at the pleasure of the President." 10 U.S.C. 1162.[4] In light of that unambiguous provision, there is no basis for petitioner's unsupported contention (Pet. 29) that "he had property interest under an 'Implied Contract' theory".[5]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

MAY 1975.

---

[4]The dissenting judges below (Pet. App. B, pp. 62-70) expressed the view that petitioner had a Fifth Amendment interest in reemployment by the military that required the protection of a full evidentiary hearing. But since petitioner had no protected interest in continued employment, *a fortiori* he had no such interest in reemployment.

[5]Petitioner has, moreover, failed to make the extraordinary showing of irreparable injury that this Court requires before a probationary government employee's discharge may be enjoined. See *Sampson* v. *Murray*, 415 U.S. 61. Furthermore recent decisions of this Court demonstrate that a serviceman in petitioner's position must exhaust his administrative remedies before seeking judicial relief. *Schlesinger* v. *Councilman*, No. 73-662, decided March 25, 1975; *McLucas* v. *DeChamplain*, No. 73-1356, decided April 15, 1975. This petitioner has not done. See note 1, *supra*.